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Laurence R. Sherfy

MILLS v. MILLS: IS CONSTRUCTION OF PRIOR JUDGMENTS A PROPER SUBJECT FOR DECLARATORY RELIEF?

Laurence R. Sherfy

Since the adoption of the Federal Declaratory Judgment Act[1] in 1934, and the various state acts, many questions have arisen concerning the use of the declaratory judgment. Among the most persistent of these questions are the effect of a declaratory judgment action on the burden of proof, the right to a jury trial in a declaratory judgment action, and whether a prior judgment is a proper subject for declaratory relief. The third question is the concern of this note.

It is fair to say that both the federal and state[2] declaratory judgment acts were promulgated for basically the same purposes: to resolve controversies before coercive relief became necessary or available; to provide an alternative to coercive relief; to permit party switching; and to remove parties from peril and insecurity. Thus, parties were allowed standing where they previously had none—where their rights were only threatened, but not yet infringed. Parties who formerly had to wait to be sued could now bring suit, and instead of being forced to ask for coercive relief, a party had the alternative of asking for a mere declaration of rights where this would best serve his interests.

The question of whether a prior judgment is a proper subject for declaratory relief, while posing somewhat of a problem, has caused much more than its share of trouble. In answering this question courts have frequently come to results inconsistent with the purpose behind the declaratory judgment acts. With its recent decision in *Mills v. Mills*,[3] the Oklahoma Supreme Court aligned Oklahoma with those states which exclude prior judgments from the scope of their declara-

1. 28 U.S.C. §§ 2201-2202 (1964).
2. While the state acts do differ, most states enacted the Uniform Declaratory Judgments Act, in some instances with minor variations.
3. 512 P.2d 143 (Okla. 1973).

tory judgment acts. In doing so the court failed to recognize an ideal situation in which to use the Oklahoma version of the Uniform Declaratory Judgments Act.[4]

Initially, the Act's use for the purpose of construing prior final judgments went almost unquestioned. Early treatises[5] and cases[6] assumed without discussion that declaratory relief was available for construing prior judgments. Indeed, even Professor Edwin Borchard, a co-draftsman of the Uniform Declaratory Judgments Act and the federal act saw no need to justify his conclusion that "where the judgment has become the source of rights but is unclear or ambiguous, there seems no reason to deny the possibility of its interpretation by declaratory judgment."[7] This early acceptance of the propriety of the procedure seemed premised on the commonsense view that if a genuine controversy arises as to the legal effect of a judgment,[8] declaratory relief should be available. Such relief would serve to clarify the parties' rights and duties under the decree and remove them from the peril of a contempt proceeding for noncompliance.

However, some subsequent decisions did not accept prior judgment construction as being within the realm of declaratory relief. These later cases generally took the position that to allow prior judgment construction by means of the declaratory judgment would make unwarranted inroads into principles of res judicata. Additionally, the earlier cases and treatises which had accepted prior judgment construc-

4. OKLA. STAT. tit. 12, § 1651 (1971). "District and Superior Courts may, in cases of actual controversy, determine rights, status, or other legal relations, including *but not limited to* a determination of the construction or validity of any deed, contract, trust, or other instrument or agreement or of any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed, except that no such declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workmen's compensation laws for injuries to persons or concerning obligations alleged to arise under policies of insurance covering liability or indemnity against liability for such injuries. The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make such determination where the judgment, if rendered, would not terminate the controversy or some part thereof, giving rise to the proceeding." (emphasis supplied).

5. W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 202, at 600 (1st ed. 1940); E. BORCHARD, DECLARATORY JUDGMENTS 181 (1st ed. 1934).

6. Lloyd v. Weir, 116 Conn. 201, 164 A. 386 (1933); Burnham v. Bennett, 141 Misc. 514, 252 N.Y.S. 788 (Sup. Ct. 1931).

7. E. BORCHARD, *supra* note 5, at 181.

8. Aetna Life Ins. Co. v. Martin, 108 F.2d 824 (8th Cir. 1940).

tion as proper did not provide a reasoned basis for this conclusion,[9] and did not, therefore, provide later courts with arguments supporting such a procedure. These two factors may partially explain the refusal of some courts to utilize the declaratory judgment in this manner. At any rate, a few of the jurisdictions which have more recently decided the issue have denied declaratory relief,[10] and Oklahoma is among them.

The facts in the *Mills* case are typical of many of the cases in which problems with prior judgment construction arise. In 1952, the plaintiff wife and defendant husband were divorced. Incorporated into the divorce decree was an executed contract settlement covering real and personal property. Eventually, a dispute arose between plaintiff and defendant as to their respective rights in a piece of property, which had been covered in the original decree, but in which the ownership interest was unclear due to either an insufficiency in the initial decree or events subsequent thereto, or a combination of both. The part of the incorporated contract pertinent to the issue stated,

> [Husband] shall pay over to [wife] one-half of the net rents and income from the said property as said rents and income is collected and received, and in the event [husband] shall sell the said property, at any time from and after this date, [wife] shall be entitled to receive one-third of the net proceeds of the sale thereof.[11]

From the date of the initial divorce decree until the time of the present action the husband leased the property to the same lessee with the maximum rental paid being $442.00 per month. In 1965, this lease on the piece of property expired and the husband entered into new agreements, not only for the piece of property covered in the decree, but also for the two adjoining pieces of property which he had acquired during the intervening period. The rental for all these lots was $2400.00 for the first two months, and $1000.00 per month thereafter. Of these proceeds the husband allocated $400 per month at all times to the lot covered by the decree. At this point a dispute arose between plaintiff wife and defendant husband as to their respective rights in the piece of property covered in the divorce decree. The

9. *Id.*; Murrell v. Stock Growers' Nat'l Bank, 74 F.2d 827 (10th Cir. 1934); Burnham v. Bennett, 141 Misc. 514, 252 N.Y.S. 788 (Sup. Ct. 1931).

10. Illinois Power Co. v. Miller, 11 Ill. App. 2d 296, 137 N.E.2d 78 (1956); Speaker v. Lawler, 463 S.W.2d 741 (Tex. Civ. App. 1971). *But see* Lower Colorado River Authority v. McIntyre, 494 S.W.2d 219 (Tex. Civ. App. 1973); Crofts v. Crofts, 21 Utah 2d 332, 445 P.2d 701 (1968).

11. 512 P.2d at 152 (dissenting opinion).

allegation in plaintiff's petition stated,

> [T]hat under the parties' aforementioned contract and divorce decree she was vested with an undivided one-third interest in the fee of the subject property . . . 'together with a vested incorporeal property right to one-half (½) of the net rents and income from said land . . . . That the said . . . described property and the right to one-half (½) of the net rents and income therefrom as provided in said property settlement agreement and divorce decree were intended and are estates and incorporeal property interests owned by the plaintiff which are transferable by her during her lifetime or devisable by will . . . .'[12]

Defendant denied the averments in plaintiff's petition and asserted that plaintiff had no vested interest in the subject property and was entitled to one-third of the net proceeds from the sale of the property only in the event that plaintiff was alive at the time of the sale. Defendant further asserted that the interests of plaintiff in the property were mere personal rights enduring only for her lifetime, and were not transferable, either voluntarily or by operation of law.

Plaintiff prayed for a judgment determining her to be the owner, as a tenant in common with defendant, of a vested one-third interest in the fee of the property.[13] Both parties agreed that what the wife sought, in addition to other things, was a declaratory judgment as to her property rights under the divorce decree.[14]

On these facts, the court held, over a dissent, "Oklahoma's Declaratory Judgment Act . . . may not be used to interpret or determine rights fixed by a final decree of a court of competent jurisdiction."[15] In reaching this conclusion, the majority erroneously based its reasoning on its characterization of the relief sought by the plaintiff. The court stated,

> We believe, after a careful weighing of the record, that much of what the Appellee Wife really sought by her action was in the nature of appellate relief or a second trial of identical issues—previously adjudicated by the decree of divorce.[16]

To support the conclusion that a declaratory judgment cannot be used to construe a previous decision, the court relied on two cases, *Crofts*

12. *Id.* at 153.
13. *Id.*
14. *Id.* at 146.
15. *Id.* at 148.
16. *Id.* at 147.

v. Crofts[17] and *Alabama Public Service Commission v. AAA Motor Lines, Inc.*[18] From the *Crofts* case the majority took the following quotation: "[T]he finality of a judgment must be respected in order to insure the rights of parties."[19] Authority taken from the *Alabama Public Service Commission* case was as follows,

> An action for declaratory judgment cannot be made a substitute for appeal; if the rule were otherwise, a declaratory proceeding would lie to determine whether a prior declaratory proceeding was erroneous, and there would be no end to that kind of litigation.[20]

Once the court decided that what the plaintiff wanted was an appeal, the case should have been disposed of on that basis and not with the broad language of the opinion. While the decision states that the wife was attempting to use the declaratory judgment statute as a prohibited method of appeal, the language of the holding is so broad that it precludes any possibility of the use of declaratory judgments for the construction and interpretation of any prior judgment, a result which goes beyond the facts as found by the court.

The court feared that permitting declaratory judgments to construe previous decisions would be tantamount to permitting collateral attack on final judgments. This fear seems illusory. A court would not be determining whether the prior action was erroneous, which, of course, would be forbidden, but merely what the prior action had said.[21] Subsequent events may render ambiguous the rights and duties determined by a judgment and when the prior judgment becomes inadequate to a novel situation there is good reason to allow a declaratory judgment to clarify the matter. The initial case would still be res judicata as to the rights it determined,[22] and the declaratory judgment would be res judicata as to the construction it placed on the prior judgment. If the court did change its former decision by means of the construction it placed on the decision, then the court would be at fault in its application of the declaratory judgment act. Surely parties needing relief should not be denied it merely because of a possi-

17. 21 Utah 2d 332, 445 P.2d 701 (1968).
18. 272 Ala. 362, 131 So. 2d 172, *cert. denied* 368 U.S. 896 (1961).
19. 21 Utah 2d at 333, 445 P.2d at 702.
20. 272 Ala. at 367, 131 So. 2d at 177.
21. No citation of authority is needed to support the proposition that courts so interpret the effect and meaning of prior judgments every day in actions non-declaratory in nature.
22. 2 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 471, at 1120 (2d ed. 1951).

bility that a court might use the declaratory judgment act erroneously.

The dissent's reasoning in the *Mills* case is more in line with the purpose of the declaratory judgment acts in general, and more particularly, with the apparent intent of the drafters of Oklahoma's Declaratory Judgment Act. The dissent concluded:

> [S]aid Act authorizes District Court actions for declaratory judgments clarifying and/or interpreting previous judgments in civil cases generally. But this is not to say that in such an action a previous judgment may be changed or modified, or that rights therein determined or fixed may be redetermined, refixed, or again adjudicated.[23]

The dissent's conclusion is based on two principal arguments. The first is that the Oklahoma Declaratory Judgment Act is broader than the statutes of other states and, therefore, other states' decisions applying their statutes cannot be heavily relied on as determinative of the application of the Oklahoma statute.[24] The other is that by use of certain methods of statutory construction it appears that the Oklahoma Legislature intended a broader application of Oklahoma's Declaratory Judgment Act.[25]

The majority relied on case authority from Arizona and Utah, but the Oklahoma statute is more broadly drawn. Both the Arizona and Utah statutes enumerate specific instances in which a declaratory judgment can be obtained.[26] While there is little justification for defeating the purpose of even these statutes by a narrow reading, there is no justification for such a reading of the Oklahoma statute. This is because in the Oklahoma statute the listing of instances in which a declaratory judgment can be obtained is preceded by the phrase "included but not limited to". Professor George Fraser, one of Oklahoma's lead-

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23. 512 P.2d at 151 (dissenting opinion).
24. *Id.* at 154-55 (dissenting opinion).
25. *Id.*
26. 12 ARIZ. REV. STAT. ANN. § 1832 (1956), states:

> Any person interested under a deed, will, written contract or other writing, or whose rights, status or legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

78 UTAH CODE ANN. § 78-33-2 (1953), states:

> Any person interested under a deed, will or written contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ing legal scholars, said with respect to the inclusion of that phrase in the Oklahoma Declaratory Judgment Act,

> Rights and controversies of all kinds may be the subject of declaratory judgment actions. Section 1 of the Oklahoma act lists certain instruments which may be construed, *but this list is not intended to be complete as indicated by the use of the phrase 'included but not limited to'.*[27]

Not only does the inclusion of this phrase reveal a more broadly drawn statute, it evinces a legislative intent for a broad application of the statute. Even though within the Oklahoma statute there is a list of exceptions to which declaratory judgment cannot be applied, this is due only to the fact that such exceptions are required by the state constitution,[28] and not to a legislative desire to restrict the applicability of the act. The dissent in *Mills* referred to this list of exceptions[29] and pointed out that the majority had neglected to apply a familiar maxim of legislative interpretation, "expressio unius est exclusio alterius"[30] when it created an additional exception to the act's application in the *Mills* case.

Because the Oklahoma Declaratory Judgment Act is remedial, the dissent could have employed another maxim of statutory construction—that which calls for the liberal construction of remedial statutes.[31] This would have been in addition to the Oklahoma statutory provision specifically providing for liberal construction of statutes.[32] Professor Fraser recognized the liberal construction to be given the statute when he stated:

> The Uniform Act specifically provides that it shall be 'liberally construed and administered'. This provision was not included in the Oklahoma act because our statutes already provide that all general statutes 'shall be liberally construed to promote their object'.[33]

In addition to the above arguments, the dissent should have explored just what were the reasons for, and what were the policies be-

27. Fraser, *Oklahoma's Declaratory Judgment Act*, 32 O.B.J. 1447, 1449 (1961), *quoting* Ch. 2, § 1, [1961] Okla. Sess. Laws 58 (emphasis supplied).

28. OKLA. STAT. tit. 12, § 1657 (1971); Mills v. Mills, 512 P.2d 143, 156 (Okla. 1973).

29. 512 P.2d at 155 (dissenting opinion).

30. Enumerating specific exceptions by the legislature excludes all others and usually precludes exceptions created by judicial construction.

31. Greer v. Yellow Mfg. Acceptance Corp., 436 P.2d 50 (Okla. 1967).

32. OKLA. STAT. tit. 12, § 2 (1971).

33. Fraser, *supra* note 27, at 1452 *quoting* UNIFORM DECLARATORY JUDGMENTS ACT § 12 and OKLA. STAT. tit. 12, § 2 (1951).

hind the Declaratory Judgment Act. Did the majority in its holding support the spirit of those policies? The answers to these questions would have provided an even better basis for the dissent.

The logical authority for these answers is Professor Edwin Borchard, a co-draftsman of the Uniform Declaratory Judgments Act, from which, with minor variations, the Oklahoma act is taken. Professor Borchard gave fourteen principal functions of the act, and several are pertinent to the issue at hand: (1) to make it unnecessary to disturb the status quo (*e.g.*, breach the contract) as a condition to bringing a contested issue to litigation; (2) not to force a party to act upon his own interpretation of his rights and at his peril as a condition of judicial action; (3) to eliminate uncertainty from legal relations by clarifying them; and (4) to enable one to select a mild but sufficient form of relief instead of the coercive form of relief required in the past.[34] When the decision in the *Mills* case is measured against this background, it can be readily discerned that these functions of the act were left unfulfilled.

From a practical standpoint, there is a more serious criticism which can be made of the *Mills* decision. The court in *Mills* seemed to be satisfied in knowing that the plaintiff had remedies alternative to the declaratory judgment action.[35] But a situation could arise where a party had no relief other than by way of the declaratory judgment. It is to this person that the Oklahoma courts have shut their doors. Granted, the number of persons in a situation similar to those in *Mills* will not be overwhelming, and those without any alternative relief will be even fewer, but it is unnecessary to deny relief to anyone where there are no real countervailing policies to weigh against those allowing an injured party the relief which he needs. Nothing speaks louder than the empirical data from the jurisdictions which allow prior judgment construction. In those jurisdictions there has been no "flood of litigation" and there has been no relief denied anyone in a position to be protected by the declaratory judgment acts.

Finally, the *Mills* case is contrary to a statement made by Professor Fraser concerning the use of the Oklahoma Declaratory Judgment Act. He said, [I]n determining rights of the parties, a court may have to construe a judgment."[36] He obviously anticipated prior judgment construction as a proper subject of the declaratory judgment.

34. E. BORCHARD, *supra* note 5, at 94-98.
35. *But cf.* 6A J. MOORE, FEDERAL PRACTICE ¶¶ 57.07, 57.08(3) (2d ed. 1948).
36. Fraser, *supra* note 26, at 1450.

All these considerations militate in favor of the dissent's conclusion that prior judgment construction is a proper application of the declaratory judgment acts. This conclusion is not only in line with the purpose and history of the declaratory judgment acts, but it is also in accord with the weight of authority. A survey of decisions in other states reveals that a substantial majority[37] of the states permit the use of the declaratory judgment for the construction and interpretation of prior judgments. The federal courts that have considered the question are unanimous in allowing prior judgment construction.[38] It should be noted, however, that because the Federal Act[39] is broader than the Uniform Act[40] the decisions of state and federal courts are not precisely comparable.

Despite the fact that many courts approve the procedure, no clear test for its application has emerged. The formulation of a test which

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37. Meeks v. Town of Hoover, 286 Ala. 373, 240 So. 2d 125 (1970); Talcott v. Talcott, 54 Cal. App. 2d 743, 129 P.2d 946 (1942); Connecticut Sav. Bank v. First Nat'l Bank & Trust Co., 133 Conn. 403, 51 A.2d 907 (1947); Koscot Interplanetary, Inc. v. State, 230 So. 2d 24 (Fla. Dist. Ct. App. 1970); Minne v. City of Mishawaka, 251 Ind. 166, 240 N.E.2d 56 (1968); *In re* Klages' Estate, — Ia. —, 209 N.W.2d 110 (1973); Stavros v. Bradley, 313 Ky. 676, 232 S.W.2d 1004 (Ct. App. 1950); Bengtson v. Setterberg, 227 Minn. 337, 35 N.W.2d 623 (1949); Fairview Cemetary Perpetual Care Ass'n v. Whitworth, 420 S.W.2d 362 (Mo. Ct. App. 1967); Margaritell v. Township of Caldwell, 58 N.J. Super. 251, 156 A.2d 46 (Super. Ct. 1959); Burnham v. Bennett, 141 Misc. 514, 252 N.Y.S. 788 (Sup. Ct. 1931); Beach v. Beach, 57 Ohio App. 294, 13 N.E.2d 581 (1937); Barnes v. Pierce, 36 Tenn. App. 181, 253 S.W.2d 33 (1952); Associated Indem. Corp. v. Wachsmith, 2 Wash. 2d 679, 99 P.2d 420 (1940). *Contra*, Glassford v. Glassford, 76 Ariz. 220, 262 P.2d 382 (1953); Choate v. Choate, 219 Ga. 250, 132 S.E.2d 671 (1963); Illinois Power Co. v. Miller, 11 Ill. App. 2d 296, 137 N.E.2d 78 (1956); Crofts v. Crofts, 21 Utah 2d 332, 445 P.2d 701 (1968); Speaker v. Lawler, 463 S.W.2d 741 (Tex. Civ. App. 1971); *But see* Lower Colorado River Authority v. McIntyre, 494 S.W.2d 219 (Tex. Civ. App. 1973).

38. Kelso v. Kelso, 225 F.2d 918 (10th Cir. 1955); Aetna Life Ins. Co. v. Martin, 108 F.2d 824 (8th Cir. 1940); Murrell v. Stock Growers' Nat'l Bank, 74 F.2d 827 (10th Cir. 1934); Board of Comm'rs v. Cockrell, 91 F.2d 412 (5th Cir. 1937), *cert. denied*, 302 U.S. 740 (1937); Reliable Machine Works, Inc. v. Unger, 144 F. Supp. 726 (S.D.N.Y. 1956).

39. 28 U.S.C. § 2201 (1970). "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

40. UNIFORM DECLARATORY JUDGMENTS ACT § 2. "Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

could be followed in all similar cases would serve the best interests of courts, litigants, and lawyers. The Florida Supreme Court has adopted a test based on Professor Borchard's earlier analysis. Borchard, in his authoritative work on declaratory judgments, was careful to note that ordinarily a final judgment is not subject to challenge by a declaratory action, but he acknowledged the propriety of the action "when an earlier adjudication is the source of rights or contest, when it is unclear or ambiguous."[41] The Florida test which was adopted in *de Marigny v. de Marigny*[42] and subsequently followed in *Koscot Interplanetary, Inc. v. State*[43] echoes these concerns:

> The only tenable exception to the rule that a declaratory judgment proceeding is not an appropriate method of questioning a final judgment or decree (valid on the face of the record) is in case the judgment or decree has become the source of definite rights *and* is unclear or ambiguous.[44]

An intelligent, carefully formulated rule such as that used in Florida is the proper solution, a solution which both implements and yet regulates the declaratory judgment action as to prior judgment construction. By requiring that the prior judgment or decree must have become a source of definite rights, this test meets objections based on the doctrine of res judicata: there is to be no "interpretation" which would change the rights of the parties. By requiring that the prior judgment be unclear or ambiguous, the test guarantees the presence of an actual controversy. Further, the test places the burden of meeting these requirements on the party seeking declaratory relief. Of course, such a test cannot completely eliminate the possibility of judicial abuse, but it does provide safeguards and at the very least it avoids the drastic alternative of eliminating the remedy altogether as was done by the Oklahoma Supreme Court in the *Mills* case. Even with the risk of possible abuse, it seems preferable that courts be required to clarify ambiguous decrees than that innocent parties be deprived of relief. Adherence to an established test, such as that used in Florida, allows the action to be used to its fullest and yet holds its use within proper bounds.

In conclusion, it is hoped that an opportunity will arise in which the Oklahoma Supreme Court can reconsider the position it took in

41. E. BORCHARD, DECLARATORY JUDGMENTS 356 (2d ed. 1941).
42. 43 So. 2d 442 (Fla. 1949).
43. 230 So. 2d 24 (Fla. Dist. Ct. App. 1970).
44. 43 So. 2d at 444-45.

the *Mills* case, and that the court will take such opportunity to remove Oklahoma from that group of states which unnecessarily restrict the use of their declaratory judgment acts.